No. 9015

United States Circuit Court of Appeals

For the Ninth Circuit

PACIFIC STATES SAVINGS & LOAN COMPANY, a corporation, substituted for Reconstruction Finance Corporation, a corporation,
Appellant,

vs.

LEO F. SCHMITT, as Receiver of BANK OF NEVADA SAVINGS & TRUST COMPANY, CARSON VALLEY BANK, TONOPAH BANKING CORPORATION and VIRGINIA CITY BANK,
Appellees.

BRIEF FOR APPELLEES

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SUBJECT INDEX

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BRIEF FOR APPELLEES

The Suit Is Inequitable and Unconscionable

As was stated by the learned trial Judge in his Opinion upon the Merits (Tr. Rec. 35), "This is a suit in equity." Though the Bill of Complaint was filed on the equity side of the Court, the facts disclosed by the record establish the suit to be inequitable and uncon-

scionable. While the trial Court reached its conclusion in favor of Appellees upon the law of the case, it is respectfully submitted that consideration of equitable principles involved is primarily essential.

The suit was brought to recover certain certificates of stock in the possession of the appellee receiver. The first pertinent inquiry is, how did the Receiver come into possession of these stock certificates? It is admitted that they were among the files of the Bank of Nevada Savings & Trust Company when the Receiver took over its assets. (Tr. Rec. 149). In other words, they were obtained while the bank was a going institution, and while the Reno National Bank (whose successor in interest brought this suit) was likewise an open operating bank. Therefore, it seems proper to state, that whether this suit is equitable or not depends upon the situation that existed while both banks were open and doing a general banking business and prior to respective receiverships, assignment or substitutions. What was this situation?

A receiver stands in no different position as to the obligations of a bank at the time of his appointment than the bank.

Organ v. Winnemucca State Bank & Trust Co.,

26 Pac. Rep. (2) Nev. 237, 238.

Preliminarily, it is most important to observe that both banks were operated and controlled by a common and interlocking director. As pleaded in the complaint (Tr. Rec. 9-10) and in defendants' answer (Tr. Rec. 27), and as Mr. Jerry Sheehan, vice-president and director of both banks, testified, "The personnel and directorate of both banks was the same, the same per-

sons acting in an equivalent capacity for both throughout the period I was there. Both banks conducted their business in the same banking room." (Tr. Rec. 145. See also Appellant's Brief, page 8). Therefore, this common management being a conceded fact, is it proper and legal that one bank may be deliberately managed to the detriment of the other and its depositors? Or, to put it another way, is it legal and proper that one bank may deliberately take a financial benefit at the expense of the other? If the answer be in the affirmative, then this suit is at least equitable. If it be in the negative, then the suit is inequitable and unconscionable and should be dismissed. Keeping in mind the common directorate, what are briefly the essential conceded facts surrounding the instant transaction?

The Reno National Bank loaned John G. Taylor, Inc., $700,000 and took its note and real estate mortgage. The transaction was handled by Mr. Jerry Sheehan, vice-president and director of this bank and the Bank of Nevada Savings & Trust Company. Later, the same corporation wanted to borrow $32,500.00 more. Its president, John G. Taylor, interviewed the same Mr. Sheehan, and was told substantially that the corporation could have the money, but it would be loaned out of the Bank of Nevada Savings & Trust Company. Security was required, and Mr. Taylor pledged his personally owned, duly endorsed stock certificates as acceptable security. These are the stock certificates in controversy here. Mr. Sheehan himself witnessed Mr. Taylor's endorsement signatures. He also initialed the notes and made notation in his own hand-writing to indicate the purpose of the loan. (Tr. Rec. 145). The stock certificates were placed in the files of that bank and the money loaned was taken out of that bank, and though the loan was manifestly approved by the com-

mon directorate and its common vice-president, Mr. Sheehan, the Reno National Bank, through its successors and substituted party in interest, is suing here to deprive the other bank of the only securities it had for the loan, and permitting that bank to hold the empty sack. Though in effect, the Reno National Bank through the common directorate authorized the loan and instructed the appellee bank to accept the security, it now sues to recover the security and makes no tender or offer to reimburse the appellee bank. Such a proceeding, it is respectfully submitted, is revolting to all principles of equity. More than this, the common directorate owed an equal duty of fairness and protection to both banks. By approving the loan from the Bank of Nevada and accepting the security, it could not properly in law authorize the Reno National Bank to sue for the possession of the security unless at least it first reimbursed in full the former bank for the money taken out of its vaults. The duty of a common directorate of two banking institutions has been well defined by the Supreme Court of the United States and Circuit and District Courts of the Ninth Circuit:

> "The relation of directors to corporations is of such a fiduciary nature that transactions between boards having common members are regarded as jealously by the law as are personal dealings between a director and his corporation, and where the fairness of such transactions is challenged the burden is upon those who would maintain them to show their entire fairness and where a sale is involved the full adequacy of the consideration. Especially is this true where a common director is dominating in influence or in character. This court has been consistently emphatic in the application of this rule, which, it has declared, is founded in soundest morality, and we now add in the soundest business policy. Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 588; Thomas v. Brownville, Ft. Kearney & Pacific R. R. Co., 109 U. S. 522; Wardell v. Rail-

road Co., 103 U. S. 651, 658; Corsicana National Bank v. Johnson, 251, U. S. 68, 90."

Geddes v. Anaconda Mining Co., 254 U. S. 590, 599,65 Law Ed. 425, Citation from page 432.

The Geddes case, supra, was an appeal from the Ninth Circuit Court of Appeals, and while the decision of the latter court (245 Fed. 225) was reversed, there was no substantial disagreement respecting the rule applicable in cases of interlocking directors. (See page 235). See also opinions in same case by Hunt, Circuit Judge, sitting as trial judge, 197 Fed. 860, 864, and Bourquin District Judge, 222 Fed. 133. See also Idaho-Oregon Light & P. Co. v. State Bank of Chicago, 224 Fed 39; 14A Cor. Jur. 125.

In a former opinion in another case in the United States District Court for the District of Nevada, involving the same appellee receiver as plaintiff, and the Reconstruction Finance Corporation as defendant, the same question of common and interlocking directors was involved. In an opinion rendered by Judge Norcross, there appears the following excerpt:

"It appears from the evidence that all of the several banks involved are a part of what is referred to in the briefs as the Wingfield chain of banks. It appears from the record that the president and vice-president of the Reno National Bank were respectively president and vice-president of all of the other banks referred to in the complaint. It also appears from the evidence that the Board of Directors of all of the banks mentioned in the complaint were the same, or at least a majority thereof were members of the Board of Directors of the Reno National Bank. The rule is well settled that where two or more corporations are controlled by the same or substantially the same board of directors, in transactions between such corporations so dominated, in order for the same to be enforce-

able against a corporation a party to any such agreement, it must appear that the agreement is advantageous to the corporation against whom such agreement or obligation is sought to be enforced."

Schmitt v. Reconstruction Finance Corporation

20 Fed. Supp. 813.

A further brief analysis of the instant situation is as follows:

The Reno National Bank entered into a contractual relation with John G. Taylor, Inc., by and through which it loaned the corporation a substantial sum of money and took its security. Later, through the same board of directors, the Bank of Nevada Savings & Trust Company entered into a contractual relation with the same corporation, by and through which it loaned the corporation a substantial sum of money and took approved security. The Reno National Bank, through this suit, is now attempting to take away from the Bank of Nevada the benefits (the security) derived through the contractual relation and placing these benefits with the Reno National Bank. It is believed that in all conscience, law and equity, this may not be done.

WHAT THE APPELLANT FIRST CONTENDS

The equitable considerations above submitted are not presented or argued in appellant's opening brief. It first contends that its predecessor in interest had a real estate mortgage, which, it asserts, carried with it a pledge of the stock in controversy here. This we respectfully deny, and the point will later be discussed in detail. Attention, however, is invited to the established fact that the stock was never assigned or delivered, as such, to the Reno National Bank, for the record conclusively shows that it was pledged definitely to the Bank of Nevada. Further, the record is clear that during the entire transaction, the Reno National Bank never treated the stock as pledged to it, nor did it ever make demand that it be pledged. On the contrary, through its common directorate it actively considered the stock as unpledged and accepted it as security for a loan from another bank over which it had exclusive control. Is it not clear, therefore, that whatever possible claim it may have had to the stock as security, it manifestly waived and forfeited by not only yielding the stock to the other bank, but approving it as security for the loan? As has heretofore been stated, an attempt to repudiate that transaction by suit and further to attempt to take away what had been authoritatively given and upon which a substantial amount of money had been loaned, is evidence of the utmost bad faith. If the appellant prevails, the common directorate will have accomplished two results. First, it will add to the assets of one bank by taking away security without consideration from another bank. Second, it will diminish the assets of one bank to the benefit of the other, and in addition, cause the one bank to suffer a loss of $32,500.00, plus interest due. It is respectively submit-

ted that such conduct by a common directorate is condemned by the Federal Courts of this country.

Lack of equities and the unconscionable nature of this suit were specially pleaded by the Fourth, Further, Separate and Affirmative Defense set up in defendants Answer (Tr. Rec. 30-31).

The Mortgage Relied Upon by Appellant, with Respect to Personal Property, Is Absolutely Void As Against Creditors.

We have urged the equitable considerations involved as conclusive against the plaintiff-appellant; and though the appellant relies in part for recovery upon the construction of the real estate mortgage introduced in evidence herein, it is respectfully urged that equity estops and forbids recovery however the mortgage might be construed. It is, however, contended that the real estate mortgage includes by blanket reference, all personal property owned by John G. Taylor, Inc., and that this personal property includes the shares of stock in controversy here. This contention likewise may not be sustained.

It is respectfully submitted that this real estate mortgage, insofar as it includes personal property, is absolutely void as against creditors, and as against these defendants who are confessedly creditors. As respecting personal property, the mortgage was not executed in conformity with the statutes and laws of the State of Nevada in that it bears no affidavits that the mortgage was made in good faith and not for the purpose of hindering, delaying, or defrauding creditors. (Statement Evidence in Tr. Rec. 81). It is, therefore, urged, that as against the defendants, the mortgage carried

nothing by way of encumbrance except the real estate, and no claim of lien for any personal property included therein may be successfully made against the defendant.

The statutes of Nevada with respect to chattel mortgages provide, among other things, as follows:

> "MORTGAGE VOID UNLESS MADE IN GOOD FAITH AND RECORDED.
>
> Sec. 3. A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers or incumbrancers of the mortgaged property in good faith and for value, unless:
>
> 1. There is appended or annexed thereto the affidavits of the mortgagors and mortgagee, or some person in their behalf, setting forth that said mortgage is made in good faith, and without any design to hinder, delay or defraud creditors.
>
> 2. It is acknowledged or proved, certified and recorded in like manner as grants of real property.
>
> *N. C. L.* 1929, Vol. 1, Sec. 987.

The mortgage in question here contains no appended or annexed affidavits of the mortgagor and mortgagee or some person in their behalf setting forth that the said mortgage was made in good faith and without any design to hinder, delay or defraud creditors. That being the fact, it must be declared, under the statute just cited, that with respect to the personal property, it is void against the defendants in this suit.

> "By statute in many jurisdictions, the mortgage must be verified as to its good faith, consideration, etc., by a sufficient affidavit annexed to and recorded with the mortgage to make it valid against creditors of the mortgagor and purchasers of the property covered by the mortgage, and the omission is not remedied by a subsequent affidavit without again recording the instrument or by an affidavit of renewal stating the requisite facts, including the

averment of good faith. So, where the chattel mortgagor neither signed the affidavit required by statute nor was sworn to the facts therein required, it doesn't render the instrument valid that he went before a notary public for the purpose and with the intent of performing every act required by law to make the instrument a valid mortgage. But between the parties and as to third persons who have no rights against the mortgagor, no affidavit is necessary. As these statutes are in derogation of the common law, they must be strictly construed. No affidavit describing the debt for which the mortgage was given is necessary to a common-law mortgage. The want of an affidavit or a defective one, is cured where the mortgagee takes possession of the property before the rights of third persons intervene."

11 C. J. Page 481, Sec. 125.

This principle has been declared by adjudications of courts of last resort in various jurisdictions and it would be superflous to burden the record with a lengthy citation of authorities. A large number of them are cited in the footnotes of the text hereinabove quoted. The rule applies with equal force to chattel mortgages as such and to so-called real estate mortgages including a description of personal property.

"There was a large quantity of personal property taken possession of by the receiver, and it appears a considerable portion thereof realized upon, and the funds have been used by the receiver in his management and control of the properties. There was no affidavit of the mortgagor that any mortgage of personal property was made in good faith and without any design to hinder, delay, and defraud creditors, and it was not recorded as a chattel mortgage." Section 1648 1 Hill's Code is as follows: 'A mortgage of personal property is void as against creditors of the mortgagor or subsequent purchasers, and incumbrances of the property for value and in good faith, unless it is accompanied by the affidavit of the mortgagor that

it is made in good faith, and without any design to hinder, delay or defraud creditors, and it is acknowledged and recorded in the same manner as is required by law in conveyance of real property.' Section 1649 provides: 'A mortgage of personal property must be recorded in the office of the county auditor in which the mortgaged property is situated, in a book kept exclusively for that purpose.' The plain literal meaning of these sections is against the contention of plaintiff that it has any lien whatever upon the personal property in the possession of the receiver, as against these petitioners. There is no evidence whatever that the petitioners had any notice of the existence of any chattel mortgage in favor of the plaintiff. Counsel for plaintiff and receiver argued that, as petitioners as creditors have not negatived notice of knowledge on their part, it should be inferred against them: but this would be a novel rule, and one that we have never seen applied. Such allegation and proof of notice should come from the one claiming the personal property under the alleged mortgage. But we are not prepared to decide that in any view, there could be here a chattel mortgage as against these creditors. In Willamette Casket Co. v. Cross Undertaking Co. 12 Wash. 190, 40 Pac. 729, this court held a mortgage void, as to subsequent creditors which was not recorded in a reasonable time after its execution. The Court said "The language of the statute and these authorities satisfy us that it was the intention of the legislature to give no preference to a chattel mortgagee over the claims of creditors who should become such after its execution, unless it was recorded within a reasonable time after its execution."

(Citing several authorities)

48 Pac. 333, particularly at Page 338.

It will be observed from an examination of the case just cited that the mortgage declared void, as to its effect upon personal property included therein, was in fact a real estate mortgage, and to that extend was similar to the character of mortgage relied upon by

the plaintiff in the case at bar. It is evident from the evidence, that the Reno National Bank acquired its real estate mortgage from John G. Taylor, Inc. without the necessary affidavits, as to the personal property included, being appended or annexed thereto. That subsequently, John G. Taylor, Inc. became a debtor of the Bank of Nevada Savings & Trust Company in the sum of $32,500.00 and that John G. Taylor deposited by way of pledge with said bank, water stock in controversy here, as collateral. Up to that time, no demand had been made upon the Taylor corporation by the Reno National Bank for the delivery of the stock nor had any demand been made by the plaintiff assignee in this case, upon the Reno National Bank for the delivery of the stock, nor has any demand been made by plaintiff assignee upon John G. Taylor, or upon John G. Taylor, Inc. for delivery of the stock up to the filing of the present suit. If any such demands were made, no evidence has been introduced to establish them. In other words, the Reno National Bank and its assignee, the Reconstruction Finance Corporation, plaintiff, not only consented and authorized the pledging of the stock to the Bank of Nevada Savings & Trust Company, but both are in addition to this, in possession of a real estate mortgage which, in the law, establishes no lien upon the stock. Before the suit was brought or before any contention at all arose with respect to the possession of this stock, the Bank of Nevada Savings & Trust Company became a creditor of John G. Taylor, Inc., through a loan of $32,500.00 and holds the note of John G. Taylor, Inc. and John G. Taylor together with the pledged stock and a collateral agreement. As such, Bank of Nevada Savings & Trust Company and the receiver together with the attaching lien creditors-defendants became intervening creditors in possession of collateral absolutely unencumbered.

It therefore follows, that the Reno National Bank never had any claim upon the stock through the so-called real estate mortgage, that the mortgage was void as to the personal property included as against the claim of the intervening creditor, Bank of Nevada Savings & Trust Company, and the attaching lien creditors-defendants, and that the plaintiff assignee, the Reconstruction Finance Corporation, stands in the same position as its assignor, the Reno National Bank.

In the case of Alferitz, et al. vs. Scott, 62 Pac. 735, a California case, the Court, on page 736, holds as follows:

> "When the mortgage was recorded, it had attached to it no affidavit of the mortgagee, or of any person in his behalf, stating that the mortgage was made in good faith, and without any design to hinder, delay or defraud creditors." Subdivision I Sec. 2957, Cov. Code reads as follows: "A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good faith and for value, unless, 1. It is accompanied by the affidavit of all the parties thereto that it was made in good faith and without any design to hinder, delay or defraud creditors." This section of the code requires the affidavit of all the parties to the mortgage to accompany it when recorded, but not necessarily all the members of a corporation or co-partnership where the mortgage is made to or by such corporation or co-partnership. Bank vs. Owens 121 Cal. 223, 53 Pac. 552. The subsequent affidavit made by the mortgagee without recording the instrument was not a compliance with the statute, and gave no additional validity to the mortgage; and, had it been recorded after the affidavit of the mortgagee was attached thereto, it would have been noticed only from the date of recordation. The creditors of the mortgagors had notice of no other mortgage than such as they found recorded, and, lacking as it did the essential already pointed out, they could proceed by attachment against the prop-

> erty then in possession of the mortgagors regardless of the alleged lien. The judgment was affirmed.''

And so it is here. The mortgage upon which plaintiff relies, did not contain the necessary affidavits required by the statute. The receiver of the various state banks as is admitted by the pleadings, attached the stock, which was not in law a part of the mortgage, for the reason, among others, that the mortgage did not contain the necessary statutory affidavits. It was, therefore, void as to the receiver, and the attaching defendants herein. The property, namely, the water stock in question, was in the possession of an independent third party, and so far as the mortgage in question is concerned, it was free from all liens and encumbrances and subject to pledge.

A matter of further great vital importance, which must be taken into consideration, is that it was not John G. Taylor, Inc., but John G. Taylor personally, who pledged his stock as security for the loan by the Bank of Nevada Savings & Trust Co. This corporation mortgage gave no information whatever as to the personal holdings of John G. Taylor. The mortgage only affected the property of the corporation so that under no circumstances may it be assumed that the mortgage in question gave any notice to attaching creditors or third parties or anyone else, as to any liens or encumbrances upon any property, real or personal, of any kind, character or nature, held, owned, or possessed by John G. Taylor personally.

And, Again, the Real Estate Mortgage, With Respect to Personal Property Is Void as to Creditors for Lack of Certainty.

Reliance is placed by plaintiff upon the contention that the mortgage included the water stock in question here because the mortgage, by a blanket clause, mortgages all personal property held by the corporation. By weight of authority, and by the law pronounced in the State of Nevada, this description is far from adequate so as to identify the personal property intended. The natural inference to be derived from such a blanket description, would be that the personal property referred to is such personal property as is situated upon or approximately connected with the real property described. It would be a far stretch of imagination to assume that such a description would cause inquiry with respect to certificates of stock held by an individual, who was not even the mortgagor, or that the corporation mortgagor itself was the owner of shares of stock subject to the mortgage. As a matter of fact, if a prospective creditor had known of the existence of the so-called water stock corporations and had examined the books and records of these corporations to ascertain the owners of the stock, he would have found that no stock had ever been issued to John G. Taylor, Inc., but that it had been issued, transferred and delivered to John G. Taylor personally and that he was the holder, possessor and owner thereof.

In a case decided by Judge Farrington, former United States District Judge for the District of Nevada, it was held, that the description of property in a chattel mortgage, then under consideration, was insufficient to exact any adverse rights as against creditors and others.

In re Petersen
252 Fed. 850

"The fact that the parties to the mortgage are able to identify the property, or to state what stock is to be covered thereby, is not what is required. The description in the mortgage must direct the attention to some source of information beyond the words of the parties themselves. It must furnish the data by which the mortgaged chattels may be identified."

Barret v. Fisch 76 Iowa 553
41 N. W. 310
14 Am. St. Rep. 238, 239

"If the oral testimony of the parties was sufficient, as the mortgagee here claims, few descriptions would or could be fatally defective, and the purpose of requiring chattel mortgages to be recorded in order to give notice to the public would be defeated."

The reported opinion cites numerous authorities in support of the doctrine that

"The suggestion which indicates the line of inquiry must come from the mortgage itself, and cannot rest alone in the minds of the mortgagor and mortgagee."

In Re Petersen 252 Fed. 849
See also Street v. Sederburg, 92 Pac. 29
Simonson v. McHenry, 92 Pac. 906
Souders v. Voorhees, 12 Pac. 526

The appellant, in opposition to this contention, asserts in its brief that "The defendant not being an innocent purchaser or incumbrancer for value cannot assert a lien on the stock adverse to plaintiff." (Brief for Appellant, Page 30). This contention, because of the common directorate and the peculiar facts involved, leads to an absurdity. Certainly the Bank of Nevada Savings & Trust Co. as a creditor had notice of the mortgage, but this notice was had through the common directorate of both banks. If, as urged, the common directorate

had knowledge of the mortgage and likewise of the Bank of Nevada Savings & Trust Co. loan, and accepted the collateral for the latter bank and approved the deal, then how may the present plaintiff appellant in all equity repudiate the transaction by insisting that the Bank of Nevada was not an innocent incumbrancer for value? If the legal doctrine of "innocence" be applied, it could be asserted with much force in that the depositors of the Bank of Nevada were innocent that their money, which had been loaned upon security approved by a common directorate, was to be later lost because of a change of front of said directorate. These depositors were undoubtedly innocent of the fact that later the common directorate would, in effect, bring a suit through an assignee to take away from them the security which they once approved. In a word, if the plaintiff appellant insists that notice was given, then undoubtedly, in the light of the established facts, it waived and gave up and surrendered all claim of lien to the Bank of Nevada Savings & Trust Co.

John G. Taylor, Inc., Never Owned the Water Stock and Could Not Have Mortgaged It. The Deed From John G. Taylor to the Corporation Did Not Pass Title to the Stock.

It is contended by the plaintiff that because the deed of conveyance from John G. Taylor to John G. Taylor, Inc. included reference to the so-called water stock, that the corporation acquired title to this stock. Under the law of Nevada, this contention may not be successfully maintained. The evidence shows conclusively and without contradiction that John G. Taylor never delivered any water stock or the certificates therein to the corporation. The evidence shows that he held them in his private possession, that he treated them as his own, that he actually pledged them to the Bank of Nevada Savings & Trust Co. and that they were never transferred upon the books of the various corporations which they represented. These undisputed facts determine definitely that the corporation never received title to the stock and therefore could not possibly have mortaged it to the Reno National Bank. The certificates of stock are confessedly personal property. In the absence of any delivery thereof and followed by an actual and continued change of possession, his so-called sale of the stock to the corporation, without such delivery and change of possession is conclusive evidence of fraud as against the defendant receiver, the Bank of Nevada Savings & Trust Co. and attaching-defendants.

Section 1536, Vol. 1, Nevada Compiled Laws provides as follows:

"SALE, WHEN EVIDENCE OF FRAUD,Sec.64

Every sale made by a vendor of goods and chattels in his possession, or under his control, and

every assignment of goods and chattels, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of things sold or assigned, shall be conclusive evidence of fraud, as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith."

Section 1537 Ibid, provides as follows:

"CREDITOR DEFINED. Sec. 65. The term "creditors" as used in the last section, shall be construed to include all persons who shall be creditors of the vendor or assignor at any time while such goods and chattels shall remain in his possession or under his control."

Plaintiff contends that delivery may be either actual or constructive, and that the delivery of the deed constituted a constructive delivery of the stock. This contention may be properly made under certain conditions and circumstances, but it is inapplicable here, as will later be pointed out, and is not supported by the statutes of Nevada, or the adjudications of the Supreme Court of Nevada.

In an early case decided by the Supreme Court of Nevada, namely Doak vs. Brubaker, 1 Nevada 218, the Court holds among other things, as follows:

"Delivery of possession of personal property may be either actual or constructive, and it seems that an actual delivery is contemplated by the statute, unless, indeed, such delivery were impossible or extremely inconvenient, in which case a symbolical delivery would doubtless be sufficient. If property mortgaged could be transferred to the mortgagee by a mere constructive or symbolical delivery, where actual delivery can be readily made, practically these sections of the statute would be entirely nugatory, and their object totally defeated. There being no means by which the public can ascertain whether personal property is mortgaged or not, except by the change of possession,

> and the person in possession, and exercising ownership over it, being presumed to be the owner, if after being mortgaged it were allowed to remain in the possession of the mortgagor, mortgage after mortgage might readily be placed upon it. This being the very evil sought to be remedied by the statute, we think such a construction should be put upon it as will most effectually carry out its object. To accomplish this purpose, and to secure probity and fair dealing in transactions of this kind, the opportunities of fraud must be removed. There must not only be a transfer of the right of the property, but the possession must accompany it."

This decision not only establishes that there was no sale of the water stock by John G. Taylor to John G. Taylor, Inc., because of a lack of delivery of the stock in question, but it also establishes that even if the corporation had acquired title to the water stock, it didn't mortgage it to the Reno National Bank because there was no delivery of it and change of possession. It may not be contended that it was inconvenient for Taylor to have made delivery of the stock to the corporation or that it was in the possession of a third party, or that it was so cumbersome or bulky that he could not conveniently have delivered it. There are no excuses or reasons to apply the doctrine of constructive delivery. No such reason was disclosed by the evidence. So far as the evidence shows, all he had to do was to endorse the stock, deliver it to the secretary of the corporation and request that it be transferred on the books of the corporation to John G. Taylor, Inc.

In the Nevada case of Carpenter vs. Clark, 2 Nev. 243, while the Court in that case held the delivery sufficient, it announced the following doctrine construing the Nevada statute above referred to:

> "It seems to us that the reasonable construction to be placed upon the statute is that the change of

possession must be actual, *bona fide,* and must continue for such a length of time as will under the circumstances of each case, be likely to operate as a general advertisement of the sale or change of title of the property."

In another case, Lawrence v. Brunham, 4 Nev. 361, the Court in concluding its opinion states as follows:

"Upon the second proposition argued by counsel we only deem it necessary to say that the statute makes the want of delivery 'conclusive evidence of fraud.' No court has the right to say that the want of delivery shall not be so where the creditor has knowledge that a sale has been attempted by the debtor. Whether the attaching creditor knew the fact or not is a matter of no consequence. The law only requires him to show that no delivery accompanied the sale. When that is done his proof is conclusive that the sale was fraudulent as to him, and no evidence of an honest purpose or fair intention upon the part of the vendor or vendee, or the knowledge by the creditor of the fact that a sale had taken place, can overcome the conclusive evidence of fraud which the want of delivery astablishes."

In another Nevada case, Conway vs. Edwards, 6 Nevada 190, the Court, among other things held as follows:

"Surely, if in this case an immediate delivery had been made (and whether there had or not, was a question upon the evidence in the case for the jury to determine), no better evidence than a continuance of that change could be adduced than proof that the plaintiff assumed the management and control of the property after the sale."

It will be observed in the case at bar that never at any time did the Reno National Bank have possession of the water stock in question. Nobody else but John G. Taylor had possession of it; and he only parted with that possession when he pledged it to the Bank

of Nevada Savings & Trust Co. as security for the corporate loan.

> "The vendee must take actual possession of the property and the possession must be open, unequivocal, substantial and continuous, and must not be taken to be surrendered back. When it appears after the purchase, that the vendee exercised such acts of ownership as is usual for persons who own the same species of property, and that it was at all time after the purchase under his direction and control and was in his charge at the time of the levy and had not been in the possession of either of the vendors, it was held that there was a change of possession."

Gray vs. Sullivan, 10 Nev. 416.

A Nevada case very much in point is Comiata v. Kyle, 19 Nevada 38. The Court on page 42 states as follows:

> "Since there was no delivery of the wood and coal, actual or symbolical, should we assume that the legal title to the ranch was in Locatelli nothing less than a conveyance by deed of the real estate, with surrender of possession thereof to plaintiff, would have given the latter possession of the personal property thereon." (Sharon v. Shaw, 2 Nev. 292, Stephenson v. Clark, 20 Vt. 627, Shumway v. Rutter, 8 Pick. 443).
>
> "Plaintiff had neither actual nor constructive possession of any part of the ranch outside of the cabin, or of the wood and coal thereon, at the time of the levy, and that motion for non-suit should have been granted."

In the case at bar, after the execution and recording of the Deed, the corporation, John G. Taylor, Inc., may have had possession of the real property deeded, but it never had possession of the personal property in controversy here, namely the water stock. The corporation, therefore, never had owned the water stock.

And, Again, There Was No Transfer of the Water Stock in Question to John G. Taylor, Inc., to Constitute a Sale or Change of Possession as the Corporation Law of Nevada Provides.

The second paragraph of Section 1617 Nevada Compiled Laws, Volume 1, is as follows:

> "The shares of stock in every corporation shall be personal property and shall be transferable on the books of the corporation, in such manner and under such regulations as may be provided in the by-laws. The delivery of a certificate of stock in a corporation to a bona fide purchaser or pledgee, for value, together with a written transfer of the same, or a written power of attorney to sell, assign and transfer the same, signed by the owner of the certificate, shall be a sufficient delivery to transfer the title against all parties except the corporation. No transfer of stock shall be valid against the corporation until it shall have been registered upon the books of the corporation."

Section 1722 Ibid provides in part as follows:

> "SHARES DEEMED PERSONAL ESTATE—HOW TRANSFERRED.
>
> Sec. 27. Whenever the capital stock of any corporation is divided into shares, and certificates thereof are issued, the stock of the company shall be deemed personal estate. Such shares may be transferred by endorsement and delivery of the certificate thereof, such endorsement being by the signature of the proprietor, or his or her attorney, appointed by written power, or legal representative duly authorized but such transfer shall not be valid against such corporation until the same shall have been so entered upon the books of the corporation as to show the names of the parties by and to whom transferred, the number or designation of the shares, and the date of the transfer, and the old certificate surrendered and cancelled, which must be done in all cases, except in case of loss or destruction of the original, before a new one issue."

It will, therefore, be observed, that not only was there no delivery and change of possession of the water stock in accordance with the express provisions of the fraudulent conveyance statute of Nevada above referred to, but there was an entire absence of observance of the requirements of the Nevada statute as to what constitutes a transfer or sale of corporate stock evidenced by certificates thereof.

The Supreme Court of Nevada in the case of Bercich v. Marye, 9 Nev. 312 determined in a case involving the construction of a California Statute, similar to the one above cited, that,

> "This restriction upon the transfer of stock determines the question of negotiability adversely to appellant."

By this decision the Supreme Court of Nevada recognized the applicability of the statute and held in effect that the statute controlled with respect to the transfer of corporate stock.

And, again, in the case of State of Nevada vs. Leete, 16 Nev. 242, the Supreme Court of Nevada recognized the force of the statute, and on page 250 declared as follows:

> "Under that statute, the whole title passes to the transferee so far as the transferrer is concerned, without an entry upon the books; but, as to everybody else, the legal title remains where it was before the transfer."

> "The mode of transferring shares of stock and the validity and effect of transfers are governed by the laws of the state or country in which the corporation was created, although the transfer may be made in another state or country, and both of the parties may reside there. From the nature of the stock of a corporation, which is created by and under the authority of a state, it is necessarily, like

every attribute of the corporation to be governed by the local law of that state, and not by the local law of any foreign state."

Fletcher's Cyclopedia Corporations,
Vol. 6, Sec. 3777.

"Where the corporate charter, governing statute, or a by-law prescribes the mode in which transfers of stock shall be made in order to be valid as against the corporation and third persons dealing with such stock, such mode must be followed."

14 C. J. 672 Sec. 1042.

"Under the provisions of the statutes of this territory, the certificates of stock in a corporation are personal property, and in order to transfer the legal title to the shares of stock represented by such certificates, they must be transferred by endorsement by the signature of the owner and delivered to the transferee, and, to be good as against third parties, must be transferred upon the books of the corporation."

Haynes v. Brown
89 Pac. 1124
Isbell v. Graybill
76 Pac. 550
Weber v. Bullock
35 Pac. 183 (Citation from 185)

In the following case cited, the Supreme Court of the United States held that the mere assignment of a certificate of stock was inoperative to pass title where the charter of the corporation provides that all transfers should be made on the books of the corporation.

Moores v. Piqua Bank, 111 U. S. 165,
28 Law Ed. 388.

In the following Federal Court case, it was held that the title to registered municipal bonds wasn't complete until transferred on the books of the obligor.

Cronin v. Patrick Co.
89 Fed. 79.

In considering a statute similar to the Nevada Statute, the Supreme Court of New Mexico held as follows:

> "On the part of the defendant in error it is insisted that under the assignment law it is competent for a failing debtor to assign all of his interests, of whatever character, in all classes of property, real, personal, and mixed, and that this transfer is not subject to the statutory requirements which are invoked in this case. We are therefore called upon to determine whether that provision of the statute which declares, "But no transfer shall be valid except between the parties thereto, until the same shall be so entered upon the books of the company," is applicable to the transfer made by an assignor to an assignee. In Wisconsin, under a statute identical with ours, it was held that the language of the statute was inoperative, and that no transfer of stock was valid, except as between the parties unless the transfer was entered upon the books of the company. In re Murphy, 51 Wis. 519, 8 N. W. 419 The same is the doctrine of the California courts. Weston v. Mining Co., 5 Cal. 186; Strout v. Mining Co., 9 Cal. 78; Naglee v. Wharf Co., 20 Cal. 529. Chief Justice Shaw, in the case of Fisher v. Bank, 5 Gray, 373, in passing upon a provision in the charter of the bank to the following effect: "The stock of said bank shall be transferable only, at its banking house and on its books,"—said: "The clause itself is too clear to admit of doubt—'shall be transferable'; that is capable of being transferred. The largest and broadest term to express alienation on the one part, and acquisition on the other. The word 'only' carries an implication, and is as distinct as negative words could make it. There is no other mode. It was not to prescribe one mode, leaving the others unaffected. It made that mode exclusive." The cases of Bank v. Laird, 2 Wheat, 390, and Rock v. Nichols, 3 Allen, 342, are cited as supporting the same proposition. The facts in the case last cited were that Rock, the holder of certain shares in a railroad company, sold them to Nichols, but the conveyance was not recorded in the books of the company, as required

by the statute. Under the conveyance thus made, the same shares were sold under an execution against Rock; and the Supreme Court, speaking by Judge Metcalf, say, "That they could lawfully be so taken admits of no doubt." Fisher v. Bank, 5 Gray, 373. In the case at bar it is admitted that the certificates representing the stock which it was sought to attach were not in possession of the debtor. They had been as already observed, hypothecated. * * * It is enough for the purposes of this case for us to determine—as we do determine —that the assignor having failed to comply with the terms of the statute prescribing the mode, and only mode, by which property of this sort could be conveyed, the assignee took no title, and that therefore the motion to quash the attachment for the reason that the property attached had already been conveyed by assignment was improperly allowed; and for that reason the action of the court below must be reversed."

Lydonbille National Bank v. Fulsom,

38 Pac. 253.

The conclusion is, therefore, that John G. Taylor never having delivered the water stock certificates to John G. Taylor, Inc., the corporation never acquired title to them. Not having acquired title, the corporation could not have mortgaged them to the Reno National Bank.

But in Addition to This, Even the By-Laws of Several of the Corporations Carry Out the Express Provisions of the Statute and Provide for Methods of Transferring Before Title Passes.

The by-laws of the Old Channel Ditch Co. provide as follows:

> "Shares of the corporation may be transferred at any time by the holders thereof, or by their attorney legally constituted, or by their legal representatives, by endorsement on the certificate of stock. But no transfer shall be valid until the surrender of the certificate and the acknowledgement of such transfer on the books of the company."

The by-laws of the Humboldt Lovelock Irrigation Light and Power Co. provide as follows:

> "Transfers of shares shall only be made upon the books of the corporation by the holder in person or by power of attorney duly executed and filed with the Secretary of the corporation, and on the surrender of the certificate or certificates of such shares. Provided, however, the power of attorney above referred to may be endorsed upon the back of the certificate of stock so transferred."

Therefore, concluding this phase of the brief, the following points are noted:

1. The suit is inequitable and unconscionable.

2. There was no sale or transfer of any of the so-called water stock by John G. Taylor to John G. Taylor, Inc., because corporate stock in Nevada is personal property and there was no delivery of any certificates by transfer, endorsement or otherwise. Further, there was no delivery in accordance with the express provisions of certain of the by-laws of the corporations hereinabove mentioned.

3. There was no mortgage of water stock by John G. Taylor, Inc., because the corporation had no stock

to mortgage, because further, the stock being personal property, the necessary affidavits to a chattel mortgage were not included in the real estate mortgage given and because further there was no delivery of the certificates of stock to the Reno National Bank, and, in addition thereto, John G. Taylor treated the stock as his own and pledged it to the Bank of Nevada Savings & Trust Co. as his own, and with the knowledge, authority, approval and consent of the Reno National Bank, appellant's predecessor in interest.

Reply to Appellant's Argument (Brief 11) That the Stock in Controversy Is Appurtenant to the Land and Passed by Conveyance Thereof.

It must be admitted that the Humboldt Lovelock Irrigation Light and Power Co., the Young Ditch Co., the Old Channel Ditch Co., and the Union Canal Ditch Co. are all corporations owning ditch and water rights represented by shares of stock. Whatever rights John G. Taylor had in and to the waters irrigating the lands in question were and are now represented by his stock in these various corporations. When John G. Taylor, Inc., was organized, the only water rights or ditch rights or canal rights or reservoir rights that John G. Taylor could sell or assign or transfer or deliver to John G. Taylor, Inc., were such rights as were represented by his shares of stock in these various corporations.

Whatever may have been the intention of John G. Taylor to have transferred, assigned and delivered his shares of stock to John G. Taylor, Inc., the undisputed, admitted and conceded fact is that he never endorsed the stock, assigned it, transferred it or delivered it. There is no evidence in this case that John G. Taylor, Inc,. through its board of directors or secretary or any

authorized official, ever demanded delivery of the stock. The undisputed evidence is that John G. Taylor, Inc., never held or possessed the stock, that it was never transferred to the corporation, that there never was a request made of the secretary to transfer it to the corporation and that the records of the various water company corporations show the stock to be in the possession and ownership of John G. Taylor. The only person who ever had possession of the water stock, so far as the evidence in this case shows, was John G. Taylor, the original owner, and the Bank of Nevada Savings & Trust Co. to whom it was pledged, and its receiver.

The appellant did not place John G. Taylor on the witness stand to ascertain why he did not deliver the water stock to John G. Taylor, Inc., if he ever so intended. No previous effort had been made by the corporation to force John G. Taylor by way of specific performance to deliver the stock; and the Reno National Bank, after it took its real estate mortgage, never made any effort to secure the stock from John G. Taylor or from John G. Taylor, Inc., but, on the contrary, permitted and definitely authorized the Bank of Nevada Savings & Trust Co. to take it by way of pledge.

It must be observed in the beginning that whatever water covenants went with the land, held, owned and possessed by John G. Taylor personally, were merged in these various companies and held, owned and represented through the shares of stock issued by them. If these shares of stock were never transferred to John G. Taylor, Inc., then this corporation never acquired any water covenants and neither did the Reno National Bank through its real estate mortgage. It must, therefore, necessarily follow, that there is no premise whatever upon which to base the plaintiff's suit, even though

we set aside for the moment the equitable considerations referred to at the beginning of this discussion. It is again insisted that equity alone defeats the suit, but aside from this, if the plaintiff has failed to establish at the very inception that John G. Taylor, Inc., acquired any water covenants running with the land, through a transfer of the stock, then the real estate mortgage and assignment thereof to this plaintiff without such covenants obviously defeats the plaintiff's claim.

The appellant contends that John G. Taylor in his deed to John G. Taylor, Inc., conveyed the shares of stock in question. (Assignment of Error 7—Brief, page 12). The answer to this is, he never did. This seems to be the premise for the plaintiff's suit, but it is a premise not founded upon fact as has heretofore been argued.

It is also contended that the real estate mortgage encumbered all water rights belonging to, incidental to, or appurtenant to, or used in connection with the land. (Assignment of Error 8—Brief, page 12). The answer to this is that all of the water rights were owned and controlled by the various water companies, that there was no transfer of title to any of the stock in these companies, and that, therefore, John G. Taylor, Inc., had no water rights to mortgage. Another answer is that John G. Taylor, Inc., never acquired the water rights represented by the stock. Another answer is, that if this were the original intention, the Reno National Bank certainly waived all claim of lien on the stock by way of mortgage when its board of directors authorized the stock to be pledged for a valuable consideration to the Bank of Nevada Savings & Trust Co.

It is also asserted in the brief that the several ditch companies are not and never have been operated for profit; that because of this, and irrespective of stock

delivery, the stock was a covenant running with the land. The purpose and function of a corporation is not to be ascertained by rumor or report or secondary evidence, but by the corporate charter and the by-laws. There is nothing in the Articles of Incorporation of the Young Ditch Co. to even indicate that the corporation was not to have been operated for profit or was not a corporation organized for profit. In fact, Sections 28 and 29 of the By-Laws provide expressly in what manner dividends may be declared and also provide that there may be set aside, out of the net profits of the company, such sum or sums as the directors may from time to time in their discretion think proper as a reserve fund to meet contingencies or for equalizing dividends. Article V of the By-Laws of the Old Channel Ditch Co. imposes a duty upon the board of directors to declare dividends out of the surplus profits when such profits shall, in the opinion of the directors, warrant the same. Paragraph 28 of the By-Laws of the Union Canal Ditch Co. provides that dividends upon the capital stock of the company when earned shall be payable as the directors shall prescribe. Section 1 of Article IX of the By-Laws of Humboldt-Lovelock Irrigation Light & Power Co. expressly provides for the payment of dividends out of profits. And further, the organization set up and its Articles of Incorporation not only prove its purposes and functions, but aside from engaging in the business of selling water, it also is in the business of selling light and power. An attempt is being made to establish the various water canals and ditch companies as non-profitable mutual corporations for the purpose of applying certain principles of law (hereinafter to be considered) to the corporations in question, but this effort must fail in the face of the corporate set-up of the corporations here involved, since the record firmly establishes them to be

corporations organized, in part at least, for profit and organized generally, and without limitation, under the general corporation law of Nevada.

The fact that money was raised for the operation of some of these corporations through assessing the stockholders, does not at all establish that the corporations were not organized for profit. The test is not as to whether the corporaion was making money so that an assessment would not be necessary, or that it was losing money which required assessment to maintain it, but what were its fundamental purposes and functions as disclosed by its Articles of Incorporation and By-Laws? The fact that all of these corporations were organized under the general corporation law of Nevada and that there was nothing in their corporate set up or by-laws to restrict or limit their operations under the general law, is conclusive proof that they were not joint stock companies or mutual associations not organized for profit. The appellant is endeavoring to maintain the contrary because its only hope to establish a stock water covenant running with the land is to place these corporations in the catagory of non-profit organizations. Here again, the appellant advances an argument in its brief, based upon an erroneous premise.

Furthermore, the evidence in the case shows that the stock in these various corporations was traded in as stock in corporations generally. Much evidence was introduced showing that many of the private stockholdings in several of the corporations were actually pledged for money borrowed from the Federal Land Bank. (Tr. Rec. 123, 126-7, 133-134). In the Union Canal Ditch Company alone, sixteen stockholders pledged their several stockholdings and borrowed money upon the stock. This is significant in not only estab-

lishing that the stockholders treated their holdings normally and in the usual method, but that banking institutions placed a definite value upon the stock as such, accepted it in the due course of business as collateral for loans advanced, and by virtue of the pledges themselves, these banking institutions, upon foreclosure or otherwise, were entitled to hold and possess the stock, even though they held no land or real property whatever in the section of the country involved here or adjacent to or connected with any canals or ditch companies or power companies or irrigation companies or individuals to which any waters or water rights could possibly become appurtenant.

Not only this, but the evidence shows that these Banks, in accepting these pledges had the stock transferred to their respective names as pledgees upon the books of the corporation. This is additional evidence of the fact that the corporations themselves acknowledged the rights of their stockholders to trade in and deal with their stock, independently as they desired. Later, the Federal Land Bank actually foreclosed some of the pledges and became owner in its own right of certain of the stock, and had the stock transferred on the books and re-issued to it. (Tr. Rec. 126). Further, John G. Taylor himself acquired stock in the Union Canal Ditch Co. away back in 1913 AND BEFORE HE WAS A LAND OWNER. (Tr. Rec. 121). Richard Kirman, Mr. Lewis, and Mr. Harris are owners of something like 28,700 shares in the Humboldt Lovelock Irrigation Light & Power Co. which the bank, of which they were officials, accepted in pledge. At the time of the pledge, neither of these individuals, nor the bank, owned any land in that district and only became owners of such land after foreclosure. (Tr. Rec. 126). A Mr. Sullivan acquired 990 shares in this corporation from

one J. H. Henry, and he was not an owner of any land in the particular district when he acquired it. (Tr. Rec. 126). The stock of the Humboldt Lovelock Irrigation Light & Power Co. was traded in and sold from one farmer to another. (Tr. Rec. 126-127). Prince Hawkins acquired 16,553 shares of stock in this corporation after irrigation had ceased; when the corporation was not furnishing any water at all and when his lands were not being irrigated by that system. Stock in the Young Ditch Co. was transferred by the secretary of the company without any inquiry at all as to whether the new owner of the stock was a land owner. (Tr. Rec. 135). Various certificates of stock in the Young Ditch Co. were likewise pledged by stockholders to Nevada Fire Insurance Co. and to Federal Land Bank.

Shares of Stock in These Various Corporations Are Not Appurtenant to the Land.

There is ample authority that water rights may be sold separate and apart from the land, to which it is appurtenant. This principle was followed in the instant matter by transferring all water rights and water rights of way to the various corporations herein referred to. The stockholders in the various corporations own these rights proportionate to the shares of stock held by each.

It must also be conceded that the stockholder had a perfect right to sell, assign, transfer and deliver his stock whether actually for consideration, or pledge it or deal in it as he saw fit. There is nothing in the corporation set up or the by-laws of any of these corporations which limits this right.

> "Unlike ordinary easements the right to the use of water of a stream may be sold and transferred

separate and apart from the land to which it is appurtenant or reserved and excepted from a grant of the land."

67 C. J. Page 1077, Sec. 553.

"The rights to a supply of water of a stockholder in an irrigation company organized to supply water only to its stockholders, are dependent on, and evidenced by, his shares of stock in the company, and will be lost to such stockholder on his legal transfer of such stock to another and will pass with such transfer of the stock to the transferee thereof, but the transferee cannot acquire greater or different rights to water than his transferor had."

67 C. J. Page 1399, Sec. 1069.

It is not disputed that a corporation may be organized with limitations and restrictions providing that stock shall only be transferred with land or that corporate stock, as such, is appurtenant to the land, or that it is a covenant running with the land. But that is not the situation here. The evidence is all the other way.

It has also been well established that in the absence of any restriction or limitation in the Articles of Incorporation or the By-Laws, the stock is separate and distinct from the land.

"A corporation may provide that the water-right shall be regarded as attached to the land, and shall pass only with it. In the absence of such provision, however, the stock is separate from the land and an execution sale of the land will not pass the stock."

Farnum on Waters and Water Rights.

Vol. 3, pages 2001-2002.

There are many authorities in support of this doctrine, some of which being "on all fours" with the case at bar.

"While Baun caused the land to be conveyed to his wife and children, he did not convey the stock

nor does it appear that he entered into any contract or received any consideration for the conveyance of the stock. On the contrary, he retained the stock, and continued to act as a stockholder of the company, in his own name. It is true, Baun used the stock as a means of procuring water for the benefit of the land which had been conveyed to his children; but he continued to occupy the land for his own benefit, while he pledged the stock as collateral security, and thereby lost it. With the loss of the stock, he lost all title to the water rights dependent thereon; so that neither he, nor his grantors of the land, can have any water rights by means of such stock. Whether the purchasers of such stock are so situated that they are entitled to receive and apply the water represented by such stock to beneficial use is a question not involved in this litigation. See Combs vs. Ditch Co., supra. Water rights acquired by appropriation in this state, for purposes of irrigation cannot be held to be inseparably annexed to the land in connection with which such rights were acquired. Even though, under certain circumstances, such rights may be considered appurtenant to the land,—a point we do not decide,—they may undoubtedly be severed from the land, and may be sold and conveyed separate and apart therefrom; and where such severance, sale, and conveyance have taken place, as by the assignment and sale of stock representing water rights in an incorporated ditch company, a subsequent sale and conveyance of the land does not pass title to such water rights."

Oppenlander vs. Left-Hand Ditch Co., et al,

31 Pac. 854. (Citation from page 857.)

"As to the extension company, more difficult questions are presented. It is not contended that there was any assignment, delivery, surrender, cancellation or re-issue of the certificate of the extension stock, or that it was transferred upon the books of the company to the trustee. The only thing relied upon is the trust deed hereinabove quoted, by which all other water rights are attempted to be conveyed and the further fact that the extension

ditch had been used to carry water for more than twenty years. It is sufficient to say that, previous to the foreclosure sale Mrs. Marshall's right to carry water of the extension ditch was based upon her ownership of stock in that company. Under the rules of the company, when the ownership of stock ceased, the right to carry water ceased. Plaintiff and its grantors failed to secure that stock,, so that the right can no longer be based upon it. The foundation for its existence having been destroyed, the right itself no longer exists. Mrs. Marshall's right to carry water having been dependent upon her ownership of the stock, and plaintiff failing to secure this, the right cannot be said to have been transferred to it. While there are many cases which hold that a water right or a private ditch may pass with a conveyance of land as appurtenant thereto, yet we know of no case, and counsel has called our attention to none, wherein it is held that a corporation owning a ditch, and furnishing the right to carry water for land to its stockholders only, must continue to carry water for land which has been conveyed to a stranger, while the stock which gave the right remained in the hands of the original owner or had been transferred to other parties."

Oligarchy Ditch Co., et al., vs. Farm Inv. Co.

88 Pac. 443. (Citation from page 444.)

"So far as appears from the proof, each stockholder had the right to use the water to which he was entitled on any land he saw fit. Under such arrangements as are here disclosed by the testimony, the water cannot be regarded as a part of the land, and is not appurtenant to it. The stock of such a corporation is mere personal property, and may be sold and transferred independent of any land; and the sale carries with it the right to use the water on any land or for any purpose the new owner may choose. The stock is merely the evidence of the holder's title to a certain amount of water. That it is personalty is settled in this state by statute. Section 330, Rev. St. 1898. It is not a corporeal, but an incorporeal, species of prop-

erty, and has nothing which gives it the character of realty."

George vs. Robison, et al., 63 Pac. 818
(Citation from page 820)

"The contention of the plaintiffs, and the theory upon which this suit was brought, is that said shares of stock were appurtenant to said lands, and passed with said lands under execution sale. Aside from general well established rules of law which forbid the sanction of said contention, it is directly opposed to the statutory law of this state. Under the provisions of section 4306, Rev. St., "shares which the defendant may have in the stock of any corporation or company" may be attached. Subsection 4, Sec. 4307 Rev. St., is as follows: "Stock or shares or interest in stock or shares, of any corporation or company, must be attached by leaving with the president, or other head of the same, or the secretary, cashier, or other managing agent thereof, a copy of the writ, and a notice stating that the stock or interest of the defendant is attached in pursuance of such writ." By section 4477, Rev. St., "shares and interest in any corporation or company * * * * may be attached on execution in like manner as upon writ of attachment." Under the provisions of these statutes, the procedure is prescribed by which shares of stock and interests in corporations may be seized and subjected to the satisfaction of debts of the execution defendant. The subjection of shares of stock in a corporation to the payment of a debt must, when done by legal process, be done in the manner prescribed by the statutes. The complaint in the case at bar shows that the statutory procedure was not followed. Shares of stock in an irrigation corporation are not appurtenant to the land owned by the owner of such shares, even though such land be irrigated by water from a canal owned by such corporation. The court properly sustained the demurrer."

Wells vs. Price, et al.,
56 Pac. 266.

"The several corporations, in which the said appellant has thus become a stockholder to the extent

above set forth, are corporations organized under the laws of the State of California, and as such are invested with the powers and duties with respect to both the properties thereof and the stockholders therein as the Constitution and statutes of California, and the by-laws of such framed in accordance therewith provide. *They are not, however, such corporations as are referred to in section 324 of the Civil Code, the stock holdings in which have been by the by-laws thereof made appurtenant to certain lands and are to be transferable only with such lands.* The capital stock of the foregoing corporations is transferable in the ordinary manner provided by law, and the owners thereof are the equitable owners of that proportion of the properties of each of such corporations which their respective number of shares of stock thereof bear to the entire subscribed capital stock of the corporation, and as such equitable owners of the properties of the corporation are also equitably entitled to the proportionate distribution of such waters as such corporation acquires by appropriation or otherwise for the various uses for which such waters are acquired. Such stockholders are in that sense and to that extent, but to none other, owners of the water and water rights which the corporation possesses, and over the distribution of which it exercises under general laws and under its particular by-laws full and exclusive control. The term "mutual water company," much stressed by the appellants herein as defining these several corporations, has no defined legal meaning which would serve to differentiate corporations, organized for the acquiring of water rights and the distribution of water, from other corporations owning and administering property for the benefit of their stockholders nor have the stockholders, in that class of corporation, any other or further rights than have those of corporations in general with respect to the administration of the affairs and properties of the corporation."

Consolidated Peoples Ditch Co., et al.
vs Foothill Ditch Co., et al.
269 Pac. 915
(Citation from page 920)

"Since shares of stock in an irrigation corporation, which shares have not been made appurtenant to land are personal property, a deed conveying land, or land and water rights pertaining thereto, will not operate to transfer stock which is not appurtenant to the land conveyed."

67 C. J. 1400.

"The right of a stockholder in a mutual water company to receive water by virtue of his ownership of stock is real property, but the shares themselves are personalty and do not pass upon a conveyance of land unless they are appurtenant thereto; they may become appurtenant by adoption of appropriate provisions in the by-laws of the water company under section 324 of the Civil Code, but one claiming that they are appurtenant is required to prove it."

26 Cal Jur. 449 et seq., and cases in note; also Imperial Water Co. v. Meserve, 62 Cal. App. 593, 217 Pac. 548 and Palo Verde, etc., Co. v. Edwards 82 Cal. App. 52, 254 Pac. 922.

Wheat vs. Thomas

287 Pac. 102

APPELLANT'S BRIEF FURTHER CONSIDERED

Appellant, in order to avoid the legal effect of corporations organized under general laws, as in the instant case, advances the doctrine that,

> "The case of a corporation is to be determined by what it does and not by what it may do under its articles of incorporation." (Brief App. 29).

In support of this contention, appellant cites two California cases, which, it is respectfully submitted, do not support the doctrine announced. In the case of Southern California Edison Co. v. R. R. Commission, 194 Cal. 757, 763, 230 Pac. 661, a petition for Certiorari to the California Railroad Commission was filed to review and annul an order theretofore made by the Commission. The Railroad Commission had established the corporation as a public utility. The Court was asked to review this finding. The articles of incorporation provided that the corporation might operate as a public utility. The Court found that,

> "There is no merit in this contention. The mere fact that its articles of incorporation empower a corporation to engage in public service does not of itself constitute proof that it is engaged in public service, or that it has dedicated such property as it may own to such service. * * * It may or may not engage in such service, and until it does, it cannot be said to be subject to the jurisdiction of the State Railroad Commission." (Citation from page 664, supra).

It may readily be observed that this case does not establish appellant's contention.

Appellant also cites the case of Del Mar Water Co. v. Eshleman, 167 Cal. 666, 140 Pac. 591, 948. (App. Brief 29). This is a similar case involving a review

of an order made by the Railroad Commission as to whether a corporation was operating as a public utility so as to confer jurisdiction upon the Railroad Commission. The crux of this opinion is stated in the first paragraph of the syllabus as follows:

> "The Railroad Commission has no power to compel a corporation which owns property in private right and has not dedicated it to any public use to apply it to a public use of any kind."

Here again the authority just cited does not support appellant's contention.

Appellant also contends that in this proceeding the appellee receiver should be compelled to turn over the stock to the appellant because Mr. Sheehan, the common vice-president and director and agent of both banks, testified substantially that "at the time the real estate mortgage was being prepared, Mr. Taylor was told that he was expected to give all the security which his company had, and he agreed to do so." (Brief App. 32).

In the first place, it must be observed that Mr. Taylor's company did not have the stock, and that therefore it could not be given as security. In the second place, there is no evidence in the case that the bank ever made a demand upon the corporation for the delivery of the stock. The evidence was conclusive that the bank accepted the real estate mortgage as ample security for the loan, which real estate mortgage made no mention of the stock. (Tr. Rec. 80). The implication is strong that the mortgage security was considered adequate. This implication is further stressed by the undisputed fact that the same bank through its common directorate authorized the stock to be pledged to the Bank of Nevada as security for a loan to the same corporation from that bank. Further, Mr. Taylor, the owner of the stock and who pledged it for the loan,

is not a party to this action. No attempt has been made here to adjudicate his rights as a pledgor, or in any way to affect his equity in the stock. Both he and the two banks treated the stock as belonging to him when he pledged it with the Bank of Nevada Savings & Trust Company. Appellant contends that his equity in that stock should be taken away from him without suit against him, without notice to him, and without demand upon him.

It will be observed that the appellee receiver was not only the receiver of the Bank of Nevada Savings & Trust Company involved here, but of three other additional banks. Appellant contends that,

> "No evidence was introduced respecting the alleged attachment liens of the three State banks for which respondent was receiver, and the only lien claimed by respondent as to which any evidence is shown of record, is that derived through the Bank of Nevada Savings & Trust Company under an alleged pledge agreement from John G. Taylor personally." (Brief App. 34).

The record facts are that the additional three bank receiverships must have been made parties defendant because of knowledge by the plaintiff of these attachment liens. There could be no other reason for making them parties. It is also alleged in plaintiff's complaint (Tr. Rec. 10-11),

> "That said Leo F. Schmidt in his capacity as receiver of Tonopah Banking Corporation, Carson Valley Bank, and Virginia City Bank claims a lien as attaching creditor of John G. Taylor, Inc., and/or John G. Taylor, for an indebtedness in the aggregate principal amount of $24,000.00."

This allegation of the complaint was admitted by the defendant receiver in his answer. (Tr. Rec. 24).

A fact admitted by the pleadings need not be supported by evidence.

Council on page 13 of the Brief state:

> "The District Court rightly concluded that plaintiff, as successor in ownership of the lands described in the complaint, is the owner of all water rights appurtenant thereto, including all rights to all means of transportation and storage of water such as dams, ditches, canals, and reservoirs, from the places or points of diversion to the places or points of use. (Opinion R. 44)."

With this statement, we are in accord. However, there is omitted from the statement a very significant fact. Notwithstanding the well-established principle of water law announced by the trial court, the appellant failed in its brief to observe that under the facts of this case the Court declined to award the stock in controversy to the plaintiff. It is plain to see that the trial Court reached the conclusion that the stock in controversy here did not constitute a water right appurtenant to the lands described in the complaint. The trial Court referred in its opinion to the case of Prosole Steam Boat Canal Company, 37 Nev. 154, 140 Pac. 720, in support of the well-recognized doctrine that the owner of land containing appurtenant water rights is entitled to an easement in ditches, reservoirs, and other irrigation works for the diversion, storage, and conveyance of water from the place of diversion to the point of use upon plaintiff's land. But again, the trial court declined to hold that the plaintiff was entitled to the possession of the certificates of stock. The Court properly held that whatever water had been placed by the plaintiff or its predecessors to a beneficial use upon its lands, it was entitled to have and to have delivered by a canal company on paying the necessary costs and expenses for such delivery; but the Court in so holding

declined to hold that the stock in controversy here should be delivered to the plaintiff.

Counsel on page 35 of the Brief attempt to apply a so-called rule of agency. They assert that, "The knowledge acquired by Sheehan, who was the sole representative of the Nevada Bank in the transaction relied on by respondent, cannot be repudiated merely because Sheehan acquired that knowledge while acting for The Reno National Bank. The knowledge possessed by an agent of two or more corporations is attributable to each irrespective of the capacity in which such knowledge was acquired." This statement leaves out of consideration entirely a very significant fact that Mr. Sheehan, the agent, was acting as a representative of two banking corporations with a common directorate, engaged in the same business, and operating under the same roof. We are making no contention here of a repudiation of Mr. Sheehan's knowledge, but we are urging that when he, as an agent of the Bank of Nevada, accepted the stock certificates in pledge for a loan by that bank, he repudiated and waived all claim he ever had to that stock as a representative and agent of the Reno National Bank. This repudiation and waiver, of course, binds his principal, the bank, for it may not be successfully contended, that the loan having existed for upwards of two years, and the security reposing in the vaults for that length of time, that the bank had no knowledge of it.

BRIEF SUMMARY

It is therefore urged here that the laws of conveyancing and mortgaging preclude a recovery by the appellant. Should the trial court's opinion be reversed despite the common directorate and the application of attendant equitable principles, the appellee bank will not only have parted with its money, but with the security approved and accepted by the predecessor of the appellant. The only possible way that the appellee bank may be made whole and its depositors and creditors protected, is for the appellant to reimburse the appellee bank in the full amount of the loan and accrued interest and take the stock. No such equitable tender has ever been made. In short, the plaintiff, suing in equity, has made no effort to do equity. It is therefore respectfully contended that the opinion of the trial court should be affirmed.

Respectfully submitted,

PLATT & SINAI,
Attorneys for Appellees.